

charged by way of legal mortgage or specifically mortgaged or charged or specifically assigned). There is evidence that the first defendants' business ceased in the latter part of 1962 when their managing director, Mr. Lucas, disappeared. The plaintiffs thereupon placed a watchman at the defendant's site at Batu Tiga. In that event I agree with counsel's submission that the plaintiffs had intervened with the consequence that the floating security had crystallised and became a fixed charge. Now, what is the position of the plaintiffs in relation to the fixed charge? It was suggested by Mr. Devaser that they are analogous to a trustee. No authorities were advanced to substantiate that proposition. I feel that I cannot bind myself to such proposition. In my view, the plaintiffs are in a position of a receiver. In fact, the instrument creating the charge enables the plaintiffs to appoint a receiver "at any time after the principal monies have become payable". The duties of a receiver are in my view subject to but not in derogation of the powers conferred by the instrument creating him. The dominant power is that of taking possession of the property covered by the charge and collecting the income derived therefrom, if any. Subject to that instrument, the general powers of the receiver are that he must exercise the same care of the property as an ordinary prudent businessman would in regard to his own property and refrain from speculating; he is responsible for any loss caused by his negligence or by his wilful default, but will not be liable for loss or mistake after he has acted honestly and without negligence; he is also a trustee for any money due from himself as receiver.

It was suggested by Mr. Devaser that the tools were looted because of the negligence of the plaintiffs and that no credit notes were taken in respect of the electric calculator, air-conditioner, and the lorry; further, the plaintiffs must account for the refrigerator given to Lucas and the proceeds of sale of the motor-car which was disposed of by Lucas, and therefore a corresponding amount of depreciation of the assets must be taken into account for purposes of the present claim. I would be glad to accede to such proposition if and when the moveable assets are to be considered in ascertaining priorities. In the present case we are only concerned with a lien on the land in question and therefore when the time arises counsel's submission will be considered.

In the circumstances there will be judgment for the plaintiffs in the sum of \$82,500 including interest against the first defendants, a declaration that the plaintiffs' lien on the said land has priority of right, claim and interest over that of the second defendant's prohibitory order, and an order for the sale of the said land under the provisions of section 257 of the National Land Code by way of public auction within thirty days

hereof. The registrar is required to fix the reserve price for the purpose of the sale. Costs to the plaintiffs.

Judgment for the plaintiffs.

Solicitors: Chooi & Co.; K. L. Devaser & Co.

B

LEOW BOKE CHOOI v. ASIA MOTOR CO. LTD.

[A.C.J. (Gill J.) March 6, 1967]

[K.L. — Civil Appeal No. 1 of 1967]

Practice and Procedure — Service — Order for substituted service of summons — Failure to post copies of summons etc. on notice board of court house in Kuala Lumpur as required by order of court — Effect of — Whether judgment obtained irregular.

Practice and Procedure — Judgment — Ex parte judgment — Setting aside.

The plaintiffs, respondents herein, filed an action against the defendant-appellant in the Sessions Court in November 1964 for the recovery of a sum of \$1,175.50 for goods sold and delivered and services rendered. As the summons could not be served on the defendant personally, the plaintiffs obtained an order for substituted service by posting copies of the summons and the statement of claim together with a sealed copy of the order on the notice board of the court house, Kuala Lumpur, and on a conspicuous part of a named premises in Kuala Trengganu. The order was only posted at the premises as required but no posting was done on the notice board of the court house, Kuala Lumpur. When the action came for hearing the defendant failed to appear in court and judgment was accordingly made against him for the amount claimed. His application to set aside the judgment having been dismissed, the defendant appealed to the High Court.

Held: the learned president had overlooked the fact that the order of substituted service had not been complied with in that no copies of the summons, the statement of claim and the order were posted on the notice board of the court house in Kuala Lumpur. The effect of such non-compliance with the order was that there had been no good and sufficient service on the defendant, so that the plaintiffs had obtained judgment against the defendant irregularly. The appeal should be allowed and the order of the learned president of the Sessions Court set aside.

Cases referred to:—

(1) *Anlaby & Ors. v. Praetorius* [1888] 20 Q.B.D. 764.

(2) *Craig v. Kanseen* [1943] 1 All E.R. 108.

CIVIL APPEAL.

G. S. Nath for the appellant.

Thoo Chow Thye (Miss) for the respondents.

Gill J.: This was an appeal against an order of the President, Sessions Court, Kuala Lumpur dated 4th November, 1965 dismissing the appellant-defendant's application to set aside a judgment which was entered against him in favour of the respondents-plaintiffs in the sum of \$1,175.50 on 24th March, 1965.

The circumstances leading up to the application were as follows. The plaintiffs filed an action against the defendant in the sessions

court on 18th November, 1964 for the recovery of a sum of \$1,175.50 for goods sold and delivered and services rendered by the plaintiffs to the defendant at the latter's request on various occasions in July 1964. As the summons issued against the defendant could not be served on him personally, the plaintiffs on 14th January, 1965 obtained an order for substituted service by posting copies of the summons and the statement of claim together with a sealed copy of the order on the notice board of the court house, Kuala Lumpur and on a conspicuous part of the premises at T/S Soon Yew Motor Company, 10-T, Kedai Hiler, Kuala Trengganu.

The order for substituted service provided that such service shall be deemed good and sufficient service on the defendant ten days after such last posting. The posting at the premises as required under the order was done, but no posting was done on the notice board of the court house, Kuala Lumpur. The action came up for hearing on 24th March, 1965 when the defendant failed to appear in court. The learned president made a note that the summons had been served and then gave judgment against the defendant for the amount claimed together with interest and costs.

On 17th August, 1965 the defendant made an application to have set aside the judgment which had been obtained against him *ex parte*. In his affidavit in support of the application he said that he came to know of the judgment on or about 10th August, 1965 when he was served with a bankruptcy notice based upon it, that he had no knowledge as to when and how the action against him was filed and he was not aware of the date of trial, that he did not owe any money to the plaintiffs and that he had valid, firm and good grounds to oppose the plaintiffs' claim. At the hearing of the application on 4th November, 1965, he gave evidence to say that he had written a letter to the sessions court asking the plaintiffs to supply particulars of the claim against him and that, as he was not in a position to answer the plaint in the absence of particulars, he would ask the court to re-open the case. An executive of the plaintiff company produced a cheque (marked R.1) which was sent by the defendant as payment for repairs to certain cars. He also produced a statement of account together with certain bills (marked R.2) which he said were handed to the defendant personally.

In the event the learned president dismissed the defendant's application on the ground that there was no merit at all in the application. In his grounds of judgment he stated that the defendant in his affidavit in support of the application had merely denied owing any money and that neither his belated statement of defence nor his affidavit disclosed any grounds for opposing the plaintiffs' claim. But in view of the basis upon which I thought that this appeal should be

A decided, I did not consider it necessary to go into the question as to the merits of the defendant's application.

B A point which appeared to have been overlooked by the learned president was that the order of substituted service had not been complied with in that no copies of the summons, the statement of claim and the order were posted on the notice board of the court house in Kuala Lumpur. The effect of such non-compliance with the order was that there had been no good and sufficient service on the defendant, so that the plaintiffs had obtained judgment against the defendant irregularly.

C In *Anlaby & Ors. v. Praetorius* ⁽¹⁾ it was held that where a plaintiff has obtained judgment irregularly, the defendant is entitled *ex debito justitiae* to have such judgment set aside. Fry L.J. said in that case at page 769:—

D "There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has a discretion to impose terms as a condition of granting the defendant relief."

E In *Craig v. Kanseen* ⁽²⁾ it was held that the failure to serve the summons upon which the order in that case was made was not a mere irregularity, but a defect which made the order a nullity, and therefore, the order must be set aside.

F For the reasons stated I allowed the appeal, setting aside the order of the learned president and substituting in its place an order that the *ex parte* judgment against the defendant be set aside. In all the circumstances of the case I made no orders as to costs of the appeal and imposed no condition on the defendant as a term for setting aside the judgment.

Appeal allowed.

G Solicitors: *Eugene Lye & Co.; Allen & Gledhill.*

H PUBLIC PROSECUTOR v. TEOH GAIK BENG PUBLIC PROSECUTOR v. CHUAH KHAY SOON

[A.Cr.J. (Ong Hock Sim J.) March 20, 1967]

[Penang — Criminal Appeal Nos. 6 & 16 of 1967]

Road Traffic — Unlicensed public service vehicle — Seizure of — Whether forfeiture mandatory — Road Traffic Ordinance, 1958, s. 92(1)(2) & (4).

I *Road Traffic — Disqualification — Special reasons — Road Traffic Ordinance, 1958, s. 74(2).*

These two appeals involved one common issue, to wit, whether an order for forfeiture of a vehicle which had been seized under the provisions of section 92(2) of the Road Traffic Ordinance, 1958, for an offence under subsection (1) was mandatory under subsection (4), following a conviction. Another ground common also to both